FILE COPY

Office Supreme Court U. S.
FILED
NOV 13 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 29.

AMERICAN SURETY COMPANY OF NEW YORK, *Petitioner*,

v.

THE BETHLEHEM NATIONAL BANK OF BETHLEHEM, PENNSYLVANIA, and L. M. REED, Receiver, The Bethlehem National Bank of Bethlehem, Pennsylvania, *Respondents*.

MEMORANDUM INDICATING ADMINISTRATIVE PRACTICE AND POLICY OF THE COMPTROLLER OF THE CURRENCY CONCERNING ALLOWANCE OF CLAIMS OF SURETIES INCIDENT TO LIQUIDATION OF NATIONAL BANKS IN RECEIVERSHIP.

GEORGE P. BARSE,
(Counsel for Comptroller of the Currency),
Attorney for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 29.

AMERICAN SURETY COMPANY OF NEW YORK, *Petitioner*,

v.

THE BETHLEHEM NATIONAL BANK OF BETHLEHEM, PENNSYLVANIA, and L. M. REED, Receiver, The Bethlehem National Bank of Bethlehem, Pennsylvania, *Respondents*.

MEMORANDUM INDICATING ADMINISTRATIVE PRACTICE AND POLICY OF THE COMPTROLLER OF THE CURRENCY CONCERNING ALLOWANCE OF CLAIMS OF SURETIES INCIDENT TO LIQUIDATION OF NATIONAL BANKS IN RECEIVERSHIP.

In compliance with the request of the Court,—made during the course of argument of the above entitled case on November 12, 1941,—an examination has been made of the records of the Office of the Comptroller of the Currency to ascertain the administrative practice and policy of the Comptroller concerning the allowance of claims of sureties, incident to liquidation of national banks in receivership,

where the payment made by a surety under the penalty of a depositary bond constituted only part payment of the deposit to secure which such bond had been given. The result of that examination follows:

1. There are no standing written or printed instructions to receivers by the Comptroller of the Currency concerning the course to be followed in such cases. The Annual Reports of the Comptroller to Congress contain no data relating thereto. The printed instructions do direct that where there is doubt as to the proof, or where legal questions are raised, concerning *any* type of claim, the matter should be submitted to the Comptroller of the Currency for proper instructions. Consequently, it has been necessary to resort to the files wherein instructions in such cases have been given by the Comptroller to the Receivers.

The office files are not arranged or segregated, and no index or classification of the files has been maintained, concerning the type of cases now under consideration. Hence it has not been possible, in the limited time available, to make an exhaustive examination. However it is considered that sufficient official data has been found to indicate definitely the policy and practice of the Comptroller.

The appendix hereof contains true copies of office letters relating to instructions by the Comptroller to receivers, together with pertinent documents concerning such cases, and preceded in each instance by necessary explanatory remarks. These letters and documents cover, approximately, the past eleven years (February 4, 1930 to February 21, 1941). There is no reason to believe that the policy and practice followed prior to February 4, 1930 differed in any respect from that of the past eleven years, and inquiry among the employees of the office indicates that these letters and documents in fact exemplify the standing policy and practice theretofore followed.

2. The letters and documents in question definitely indicate that it has uniformly been the position of the Comptroller that where the payment made by a surety under the penalty of a depositary bond constituted only part payment

of the deposit to secure which such bond had been given, the surety will not be allowed a claim for the entire amount of such deposit as it existed at the date of suspension or closing of the bank, and that the amount of the claim to be allowed the surety will be measured by, and restricted to, the amount thus paid by the surety.[1]

3. Inasmuch as it comprises part of the official data covering the eleven year period, there is also included in the Appendix (pp. 36-43) correspondence between the Comptroller and the receiver in the instant case. It will be noted therefrom that the position taken by the Comptroller is strictly in accord with the policy and practice hereinabove indicated, and that the letter of the receiver of December 23, 1935 (R. 8) was written without previous instructions from the Comptroller, and further, that said correspondence indicates that the offer of August 30, 1939, made by the receiver to the surety (R. 6) was not authorized under the previous instructions of the Comptroller to the receiver. Counsel for petitioner has today (November 13, 1941), by telephone, authorized the following statement to be inserted by the undersigned as counsel for respondent:

> "With reference to the admitted allegation in paragraph 14 of the Bill of Complaint (R. 6) concerning the offer of Receiver Nieman of August 30, 1939, I am advised by counsel for petitioner that this offer was orally made by the receiver during the course of a conference on that date attended by the receiver, by counsel for petitioner and by local counsel for the receiver."

Respectfully submitted,

GEORGE P. BARSE,
(Counsel for Comptroller of the Currency),
Attorney for Respondents.

---

[1] It may be of interest to recall previous instances where this Court has noticed and considered administrative practices of the Comptroller. (*Inland Waterways Corp.* v. *Young* (1940), 309 U. S. 517, 524; *Corsicana National Bank* v. *Johnson* (1919), 251 U. S. 68, 83; *Rawlings* v. *Ray* (1941), 312 U. S. 96, 99. Also see: *Lewis, Receiver* v. *Fidelity & Deposit Co.* (1934), 292 U. S. 559, 563, 570 (footnote)).

APPENDIX.

The following letters and documents, covering the period February 4, 1930 to and including February 21, 1941, are grouped with reference to the particular bank involved, and each group is numbered, for convenience of reference.

Explanatory remarks, at the beginning of each group, are then immediately followed by the related letters and documents.

I.

Office letter of February 4, 1930 instructed the receiver of the First National Bank of Clarksville, Arkansas, to allow claims to certain surety companies (who were sureties on depository bonds given as security for deposits of the State of Arkansas) in amounts paid by them in the respective sums of $10,000 and $15,000, the whole amount of the State's deposits totalling $50,000. Litigation ensued and the decision of the United States Circuit Court of Appeals for the Eighth Circuit appears to affirm the position taken in the above mentioned office letter. *State of Arkansas* v. *Pufahl* (C. C. A. 8th, 1931) 52 F. (2d) 116.

February 4, 1930

Mr. M. J. Pufahl, Receiver,
First National Bank
Clarksville, Arkansas.

Dear Sir:

Your letter of January 28th has been received in further reference to Liability #1605 representing a deposit balance in the amount of $50,058.60 due the Treasurer of the State of Arkansas, including interest to the date of suspension at the rate of 3 per cent. This deposit is secured by $25,000 in Fourth 4¼ per cent Liberty Loan bonds, $10,000 surety bond executed by the Aetna Casualty & Surety Company and a $15,000 bond executed by the United States Fidelity & Guaranty Company.

In your letter dated January 11th you requested instructions as to the procedure which should be followed in con-

nection with the Treasurer's claim and such instructions were contained in office letter dated January 20th. You now advise that the situation with regard to the claim of the State Treasurer is somewhat unusual in that the Treasurer holds three separate and distinct contracts, one with the bank covering $25,000 of his account with a collateral agreement; one executed by the Aetna Casualty & Surety Company for $10,000 and one of $15,000 executed by the United States Fidelity & Guaranty Company. You have forwarded with your letter copies of these three contracts and in view of the existance of these contracts it is your opinion that the Treasurer is only entitled to retain a sufficient amount of the proceeds of the Liberty bonds held to cover $25,000 of his account, plus interest accrued on such amount to date of suspension and that the balance of the proceeds should be paid to the trust. It is further your opinion that the bonding companies are not entitled to benefit by reason of the Liberty bonds held and that they are entitled to receive dividends only on $25,000 of the account rather than the full amount thereof. You ask that the office give consideration to the additional information furnished and that further instructions be then rendered you.

In view of the additional information furnished as contained in your letter and in the three copies of the contracts above referred to, the office concurrs in your opinion that the Treasurer is only entitled to retain from the proceeds of sale of the Liberty Bonds, $25,000 plus interest on this amount to date of suspension, at the rate of 3 per cent and the balance of such proceeds should be paid to the trust. On the other hand the bonding companies are only entitled to subrogation to the extent of the amounts paid by them, which we understand will be approximately $10,000 and $15,000, plus the amount of interest accrued to the date of suspension.

You will therefore require the Treasurer to pay to the trust the excess amount recovered from the Liberty bonds and when payment to the Treasurer has been made by the Bonding Companies you will advise as to the exact amounts paid by each and you will then be instructed with regard to the issuance of Receiver's Certificates to the Treasurer for assignment by him to the two companies.

Yours very truly,

(Signed) A. B. MERRITT,
Assistant Supervising Receiver
Div. of Insolvent National Banks.

II.

The Receiver of the First National Bank of Caruthersville, Missouri, was instructed by office letter of May 22, 1931 to allow general claims to the corporate sureties and the personal sureties who had paid in part the bank's obligation to the County in the amounts actually paid by such sureties. Suit was commenced by one of the sureties and the decision of the District Court of the United States In and For the Eastern Division of the Eastern Judicial District of Missouri was handed down on November 24, 1933. As the opinion of the District Court is not reported, copy of the opinion is also inserted. This decision allowed the surety a claim as a general creditor only for the amount he actually paid in discharge of his obligation as surety. The decision was affirmed by the Circuit Court of Appeals, Eighth Circuit, in 1935 in the case of *Ward* v. *First National Bank of Caruthersville*, 76 F. (2d) 256.

May 22, 1931.

Mr. Ralph E. Bailey, Receiver,
First National Bank,
Caruthersville, Missouri.

Dear Sir:

Receipt is acknowledged of your letter of May 4th referring further to the deposit of Pemiscot County totaling $56,356.38 at suspension secured by three corporate surety bonds in the sum of $10,000 each and a personal surety bond in the amount of $35,000 given by the former officers of the bank, the bank having pledged with such former officers County warrants of the total value of $21,002.77. Your bank's obligation to the County was reduced as of suspension by offsetting County warrants totaling $8460.74 contained in the bank's assets The County has now been paid in full, each of the corporate sureties contributing $7368.56. The personal sureties paid the County the total sum of $25,789.96 which included the sum of $21,002.77 obtained for the County warrants by sale in the open market. You discuss the possible secured creditor status of the personal sureties and request instructions concerning the adjustment of claims based on these transactions.

It is a well settled requirement of equity that the surety who holds security of an insolvent debtor must give the benefit of it to the creditor for whom he is surety until the debt is fully paid. Jenkins, Receiver v. National Surety Company, 277 U. S. 258-267. An application of this principle to the facts here presented results in the conclusion that the personal sureties had the duty to deliver the County warrants totaling $21,002.77 to the County to be applied in reduction of the County deposit balance by way of offset. It then became the duty of all the sureties, none of whom held security, to reimburse the County for the full amount of its deposit balance. This has been done by contributions of $7368.56 by each of the corporate sureties and $4787.19 by the personal sureties. On this basis all sureties are entitled to general claims only for the amounts contributed to the County, the County Treasurer under direction of the County Court having assigned his claim against your trust apportioned according to the contributions made by each surety. Accordingly you are authorized to allow each of the three corporate sureties general claims in the amount of $7368.56 and the personal sureties collectively a general claim only in the amount of $4787.19, thus closing the matter.

Yours very truly,

J. E. Fouts,
Supervising Receiver,
Div. of Insolvent National Banks.

DISTRICT COURT OF THE UNITED STATES
in and for the
EASTERN DIVISION OF THE JUDICIAL DISTRICT
OF MISSOURI.

(Copy)

No. 9941.

R. L. WARD, *Plaintiff*,
v.
FIRST NATIONAL BANK OF CARUTHERSVILLE, AND
R. E. BAILEY, AS RECEIVER, ETC., *Defendants*.

FARIS, J.

MEMORANDUM OF ORAL OPINION OF THE COURT.

Plaintiff, a surety on a bond to secure to Pemiscot County, Missouri, a deposit of county money in the First National Bank of Caruthersville, Missouri, sues the bank, now in the hands of a receiver, and the receiver thereof, for an allowance in plaintiff's favor, under the doctrines of subrogation, for the sum of $26,230.06.

Defendants concede in their answer that plaintiff is entitled to have allowed a claim as a general creditor, in the sum of $4,827.20.

The case was submitted to the Court on the merits, on an agreed statement of facts, with the privileges reserved to either party to offer additional evidence on the trial. Defendants offered none, but plaintiff put in evidence the depositions of two witnesses. These witnesses hardly added anything to the facts which control the case. They merely detail the history of the manner, means, and date of pay-

ment by plaintiff to Pemiscot County (hereinafter called County, simply, for the sake of brevity), and make clear the fact (as to which there is no dispute) that the plaintiff paid his surety obligation to the County by his personal check on another bank, and that this check was taken in lieu of cash by the County.

The controlling facts, as said, are agreed to, and so they are just as open to any other court as they are to this Court, without any specific findings of fact, as required by Rule 70½ of the Rules in Equity. However, ease and clarity of discussion will be augumented by a *precis* of these facts. They run thus:

On and prior to the 17th day of January, 1930, the First National Bank of Caruthersville (called herein, for brevity, simply the Bank) was a solvent banking concern, and was and had for some time been a depository of the various funds and moneys of the County, and of divers school districts and drainage districts, as well. As such depository the Bank got only one-third of the money of the County, but, obviously, that is not important.

When the Bank was made the County depository, on the 6th day of May, 1929, it was required to give, and did give, to the County, four bonds in the sum of $10,000 each, to secure County moneys on deposit. These bonds were made by four certain bonding companies, and premiums, of course, were paid therefor.

On January 17, 1930, the County, for reasons which do not appear and which, therefore, have nothing to do with the case, ordered that in addition to the $40,000 security to the County, evidenced by the four corporate surety bonds, the Bank should execute an additional bond, in the sum of $35,000, with personal securities thereon.

Plaintiff, who was at that time the President of the Bank, together with the cashier and all of the directors of the Bank, executed and delivered as sureties, with the Bank as principal, this personal security bond to the County in the sum, as said, of $35,000. The Bank, at the time of delivering this personal security bond, held some $20,000 of the

obligations of the County, called in the record County warrants, but which were drawn against divers different County funds, as also against a drainage district, a road district, and a special road district. (See, Sections 9985 to 9986, R. S. Mo., 1929.)

In order to secure themselves against loss, in becoming personal sureties for the Bank to the County, plaintiff, and the other officers and directors of the Bank, passed a resolution and entered into a contract with the Bank whereby the $20,000 in County warrants then owned and held by the Bank, should be segregated and put up as collateral by the Bank to secure plaintiff and the other officers who became co-sureties with plaintiff, against loss by reason of their becoming such sureties.

It does not appear from the agreed facts who held this collateral (save that it was held by the officers of the Bank who had signed as sureties), but, obviously, it was held in such wise as that it did not come into the hands of the receiver.

On November 25, 1930, the Bank was taken over by the Comptroller of the Currency, who duly appointed defendant, Bailey, as Receiver to administer its affairs and to wind it up. When the Bank failed the County had on deposit therein, to the credit of one "Isaac McKay, Treasurer" the sum of $56,277.37. Part of this money belonged to, or had been apportioned to and was held by the County for, well-nigh each and all of the various funds into which by law the County, through its County Court, is required to divide the County money. (See, Section 9985, *supra.*) In addition, some $42,000 of it was held by the County in such trust as the statutes of Missouri create, for some thirty-six road districts and some twenty-three different drainage districts.

When the Bank went into the hands of the receiver, it owned, including interest, $8,460.74, in County warrants (this, in addition to the $20,000 in warrants held by plaintiff and his co-sureties as collateral, as already stated), which County warrants were free assets, that is, which had

not been put up as collateral, or otherwise hypothecated. These warrants were likewise drawn against the several funds of the County and against certain road districts. The Comptroller of the Currency demanded that the County give credit to the Bank, by way of set-off, in the sum of these warrants against the County's deposit of $56,277.37 (including interest). To this set-off, the County agreed, and so the net amount to be paid to the County by the corporate and personal sureties of the Bank was $47,695.65.

When the Bank failed, one policy, or corporate surety bond for $10,000, had expired. So, there was then in force when demand for payment was, on December 1, 1930, made by the County on the corporate and personal sureties, only $65,000 in security. Each of the three remaining corporate sureties had, in their contracts with the County, a clause to the effect that they should not be liable to the County in excess of the proportion which the amount of their bonds bore to the whole security given by the Bank to the County. Thus each corporate surety became liable to pay to the County 10/65 of the net balance on deposit in the Bank to the credit of the County treasurer.

On the 27th day of February, 1931, these corporate sureties paid to the County by check, each the sum of $7,368.56, or the aggregate sum of $22,105.68, leaving a balance of $26,230.06 to be paid by the plaintiff and his co-sureties on the personal bond. This balance was paid by plaintiff in a check for $30,794.12, dated February 27, 1931, and payable to the County Treasurer, and drawn on the Bank of Caruthersville. The several sources of the money in the latter bank on which this check was drawn, are thus set out in the agreed facts:

> "That at the time said check was drawn R. L. Ward had on deposit in said Bank of Caruthersville $8925.27; that after said check was drawn he sold to said Bank of Caruthersville warrants of said county, hypothecated as aforesaid, for their face value, plus interest to that date, in the sum of $12,118.08, and deposited same on that or the next day in said bank; that thereafter,

on February 28th, 1931, the plaintiff collected from the county on part of the warrants so hypothecated, as aforesaid, the sum of $7321.85, which was deposited by him in said Bank of Caruthersville on February 28, 1931, and thereafter, on the same day, February 28, 1931, the remainder of the $20,000 hypothecated warrants were collected from Pemiscot County and deposited, together with other funds, to the credit of R. L. Ward in the sum of $2,330.68; that thereafter on March 2nd, 1931, the check given by R. L. Ward to the Treasurer of Pemiscot County aforesaid, was by said Treasurer presented for payment and paid by said bank."

By a contract found in the record and made a part of the agreed facts, the three corporate sureties waived any claim to the right to share with the personal sureties in the collateral taken by the latter to secure themselves, namely, the $20,000 worth of warrants, about which this controversy rages, so that question is out of the case.

In passing, but probably of no decisive force in the case, the defendants on June 13, 1931, and so long after the County had been paid in full, entered on the books of the Bank a set-off against the claim of the County in the sum of the then worth of the $20,000 in warrants then held partly by the Bank of Caruthersville, which had bought them, and partly by the County itself, which had paid and cancelled them. In passing, it may be said that the payment by the County for a part of these warrants was brought about by the fact that money had come into the County treasury from the cash payment made by the corporate surety. In this attempted set-off the County did not acquiesce, nor did plaintiff and his co-sureties on the personal bond acquiesce. Also, in fairness, but deemed of no decisive importance, it may be said that the County agreed by stipulation with plaintiff and the corporate sureties, to procure an allowance in its favor as a general creditor of a claim for the full amount of net balance of County deposits held by the Bank, to-wit, $47,695.65, and to assign this claim to the plaintiff and his co-sureties on the personal

bond and to the three corporate sureties, in the proportions, respectively, of 35/65 to plaintiff and the personal sureties, and 10/65 to each of the corporate sureties. Whether this was ever actually done, is dark upon the record. But since defendants had no part in this stipulation, I think it cuts no figure in the case, because, if outside of this fact other facts in the case shall warrant, the right of subrogation exists in favor of the personal sureties.

Upon the above facts, plaintiff contends for an allowance in his favor of $26,230.00, while defendant receiver concedes his right to an allowance as a general creditor, in the sum of $4,827.20. In the light of such latter concession, I need not consider whether plaintiff, absent assignment, may sue alone, without joining his co-sureties on the personal bond, for the point is nowhere raised.

Coming first to the last point mentioned above, and its legal implications: Does it at all affect the case that the County agreed to have the sum of $26,230.06 allowed in its favor and to assign the allowed claim to plaintiff? I repeat, that it is obvious that it does not. On first blush, a contrary view is plausible; this, for the reason that, while it was held in the case of *Merrill* v. *Bank*, 173 U. S. 131, that a creditor having security for his debt may hold the security and yet have his claim allowed for the full amount thereof, plaintiff is not, nor was he ever, the creditor of the Bank. The above rule long doubted, but set at rest in the national courts, at least, by the *Merrill* case, *supra*, would allow the County, as the creditor of the Bank, to have had allowed in its favor, its full claim in the sum of $47,695.65. Having done this, it might be urged that it is not at all the concern of the defendant receiver, as to whether the County shall see fit to assign its allowed claim to plaintiff or not. But the above argument overlooks a further condition, in the *Merrill* case, *supra*, which is that the creditor who is secured, may not himself obtain from his debtor more than the full sum of his demand. This the County already has, and it can take no more, nor can it by assigning

enable its assignee to get more. And so, whatever right plaintiff has here is bottomed wholly on the doctrine of subrogation and not at all through a derivative right or contract arising from assignment, even if that assignment be eked out by regarding that as done which ought to have been done. Indeed, it would seem that if regarded as bottomed on assignment, the logic of the situation, and the conclusion from the rules governing, would preclude plaintiff from recovering any sum.

How stands the matter on the right of subrogation? Generally, of course, it is well-settled that a surety who pays a debt for another stands in that other's shoes, as to the right of having a claim allowed against the debtor whose debt the surety pays. This was probably the first and earliest application of the doctrine. So, in a proper case of payment by a surety, the law conferred the right of substitution or subrogation of the surety for the creditor, in any claim against the debtor, which the surety had paid. But the doctrine is not to be applied arbitrarily, and in a way which will work injustice to any one having an interest in the subject-matter, but, on the contrary, it is to be applied in order to do justice, and avoid enriching one person at the expense of another.

Here, plaintiff who paid the $26,230.06 balance due the County, yet paid it, in large part, by using the assets of the Bank which were pledged to plaintiff to secure him on his contingent liability to the creditor, as a surety. Of his own money he put in but $4,827.20. (These figures are bottomed on the concession of the defendants; my own figures would differ slightly, but I have found the mathematical calculations in the agreed facts, utterly confused, and confounded.)

If the Bank should pay a dividend of even 20 per cent, plaintiff's part thereof, should his contention be sustained, would be the sum of $5,246, which would exceed the actual money paid by him, by some eight hundred dollars. This result equity will not countenance, and the doctrine of subrogation will not be applied when it brings about such a result (25 R. C. L. 1314). Moreover, it is fairly well-settled

law that, a surety who takes collateral from a debtor to secure a creditor of such debtor, holds such collateral for the creditor (*Jenkins* v. *National Surety Co.*, 277 U. S. 131). If, under this rule, plaintiff had turned over to the County the $20,000 worth of the County's warrants (the amount was in fact, with interest, $21,770.61) there would have been left for plaintiff to pay as a surety, only some $4,500. This turning over of the collateral would have occurred perforce the rule of the *Jenkins* case, *supra,* and not in obedience to the law of set-off contended for by defendants.

As I see the case, it is not necessary to decide whether a county, under the law of Missouri, can be compelled to set off county warrants, drawn pursuant to law (Sections 9985, 9986, R. S. Mo., 1929), upon many different funds and against money held in trust (likewise pursuant to law), for divers governmental purposes. Some of the latter, to mention but a few, are levee districts, drainage districts, school district, road districts, courthouse, jail and school building funds, and the interest and sinking funds belonging thereto. As forecast, it seems to be fairly well-settled law that a surety is not entitled to be subrogated to the claim of the creditor until the latter has been paid in full, as has already been said (*National Surety Company* v. *Salt Lake County,* 5 Fed. (2d) 34), and here the creditor was not paid in full with plaintiff's money. But this rule, after all, has little to do with the case, since it must, in any event, ride off on the rule that subrogation will not be decreed when its effect would be to work an injustice on other creditors. Rules of law must be so far general as to apply always to given states of fact in the same way. The rule urged by plaintiff would, in many cases, and probably here, allow him to reap where he had not sown.

Clearly, plaintiff used, in order to pay some $21,000 of his obligation to the County, assets which belonged to the Bank, but which were impressed by operation of law with a lien in favor of the County. These assets were not and never became the property of the plaintiff. So, he could not use them to pay his personal obligation. He could

apply them only to such use as the law and the lien thereof impressed on them required. Otherwise, he would have had no right to take these assets from the Bank whose property they were. Plaintiff was not a creditor of the Bank. As already said, the latter owed him nothing. So, cases like the *Merrill* case, *supra*, and those which followed the rule it lays down, have, I think, nothing to do with the case at bar. If plaintiff had paid his own money to the County *in toto*, he would have been entitled to an allowance by subrogation therefor. But he did not do so, except in part, and so he is entitled, perforce the doctrine of subrogation, to an allowance as a general creditor, only for that sum for which he actually became a creditor, namely, $4,827.20, and upon this sum, as a general creditor, he is entitled to participate in all dividends heretofore and hereafter declared.

A decree may be presented accordingly.

St. Louis, Missouri,
November 24, 1933.

III.

Office letters of May 17, 1932 and May 2, 1933, instructed the Receiver of the Olympia National Bank of Olympia, Washington, to allow general creditor claims to sureties on depository bonds given to secure County funds in the amounts actually paid by said sureties. Litigation ensued in this case and the decision of the United States Circuit Court of Appeals, Ninth Circuit, is reported as *Douglas* v. *Thurston County* (C. C. A. 9th, 1936), 86 F. (2d) 899.

May 2nd, 1933.

Mr. E. B. Benn, Receiver,
Olympia National Bank,
Olympia, Washington.

Dear Sir:

We have your letter dated April 19, 1933, with further reference to the Thurston County litigation signed in your behalf by James P. Neal, attorney for your trust, requesting instructions respecting the character of the answer this

office desires you to make to the cross-complaint of the surety companies, served upon you in this litigation.

This office takes the view that the rights of the parties are fixed as of the moment of insolvency and suspension of the Olympia National Bank, Scott v. Armstrong, 146 U. S. 499; Balch v. Wilson, 25 Minn. 299, 33 Am. Rep. 467; and McCandless v. Dyar, 34 Fed. (2) 989; and it appears to us that the contention of the surety companies that the collateral should be exhausted before any liability attaches to them is erroneous and that your attorney should contest this point. We believe your answer should assert primary liability of your trust with respect to the pledge of assets and the surety companies with respect to the bonds on a proportionate basis, that is to say, the liability of the bonding companies is primary and is fixed as of the amount the penalty of the bond bears to the total amount of the depository bonds and other securities which stand to secure the County Treasurer's deposit. In short we desire your attorney to assert that the pledge of the assets and the surety bonds should be considered as a primary and absolute individual or single pledge of securities, and the liability of the parties to be determined in accordance to the proportion that the pledge of assets and the bonds bears to the principle amount of the indebtedness. This necessarily negatives the theory of the surety companies that the collateral should be first exhausted before any liability attaches on the bonds. Further, the question arises as to whether or not the ratios of the securities and the bonds would be fixed in determining the liability upon the par value of the collateral or upon the market value of the collateral as of the date of the closing of the bank. It is our opinion that the rights of the parties are fixed as of the moment of insolvency and suspension, and that ratio will be determined by fixing the market value of the collateral as of the date of the closing of the bank. Since this is a favorable view, we presume the surety companies will not contest this aspect of the case.

Yours very truly,

(Signed) R. L. MILLER,
Assistant Supervising Receiver,
Div. of Insolvent National Banks.

May 17, 1932.

Mr. H. W. Douglass, Receiver,
The Olympia National Bank,
Olympia, Washington.

Dear Sir:

We have copies of the pledge agreement and surety bonds, forwarded under date of May 7, 1932, regarding the accounts due J. R. Johnston, County Treasurer, at suspension, which were secured by a pledge of assets of the trust amounting to $61,878.82 and surety bonds to the amount of $47,500.00.

It appears that under the second agreement of the bond the surety shall be liable thereunder for such proportion of the money deposited with said principal by the County Treasurer of said county, and payment of which is refused by said principal, upon demand of the County Treasurer of said county, as provided in the condition of the bond, as the penalty of the bond bears to the total amount of depositary bonds and other securities for deposits furnished by the principal to the County Treasurer of said county. It follows that this agreement establishes a proportion of liability, and the position taken by the surety company that the security held by the Treasurer of Thurston County be sold by said Treasurer and the proceeds applied upon his balance due from the bank, is not correct. The surety companies must pay their pro rata share of this account and your securities may be liquidated to the extent of the pro rata share they bear to the full amount, as the proportion of liability may be disclosed.

The surety companies, in turn, will be allowed to file a general claim against your trust for the amounts disbursed by them in the payment of this claim. You, of course, will receive the balance of the securities from the County Treasurer, after the claim has been liquidated, and the proportionate amount for which the securities are liable have been realized from the proceeds received from the sale thereof.

You may advise the surety companies and J. R. Johnston, County Treasurer, of our decision in this matter, and instruct the attorney for the Olympia National Bank trust, James P. Neal, Esq., to protect the trust in the matter and effect the result heretofore described.

Very truly yours,

(Signed) R. L. Miller,
Assistant Supervising Receiver,
Div. of Insolvent Nat'l. Banks.

IV.

The letters of May 27, 1935 and November 6, 1937 to the receiver of the First National Bank of Elizabethton, Tenn., and the motion of the receiver in the proceedings in the United States District Court in the case of *Maryland Casualty Company* v. *Cox,* Receiver of said bank, indicate office position restricting the surety's claim to the actual amount paid instead of allowance of a claim for the full amount of the deposit. The opinion of the District Court sustaining office position is not reported and hence is inserted.

The District Court was affirmed, as to this point in *Maryland Casualty Co.* v. *Cox,* 104 F. (2d) 354, 358.

May 27, 1935.

Mr. John I. Cox, Receiver
The First National Bank
Elizabethton, Tennessee.

Dear Sir:

In reply
refer to CC

This will acknowledge receipt of your letters of May 14th and May 15, 1935 having reference to the suit involving the various bankruptcy deposits with your trust, which is designated as United States of America for use and benefit of E. M. Miller, Trustee, et al, v. First National Bank, et al, now pending before the United States District Court, Eastern District of Tennessee.

At the time of the deposit of the bankruptcy funds, the First National Bank gave as security the $60,000.00 bond with sureties and pledged assets of the bank as collateral security to the $60,000.00 bond. As security for the same deposits the Maryland Casualty Company gave a bond in the amount of $17,500.00. No assets were pledged to secure the Maryland Casualty Company for their liability on this bond. The deposits have been paid in full by reason of the payment of dividends and the application of the collateral pledged by the bank as security to the $60,000.00 bond and the payment by the Maryland Casualty Company of its liability in the amount of $17,500.00. The Maryland Casualty Company having paid in full the face amount of its bond in the sum of $17,500.00, is now attempting to secure possession of the remaining assets of the bank which were

pledged to secure the $60,000.00 bond, and also asks permission of the court to file claim against the Receiver of the First National Bank for the total amount of the several trustees' deposits aggregating the sum of $50,065.83 and to receive dividends from the Receiver of the First National Bank on the basis of this amount instead of on the sum of $17,500.00 only. It appears that the case has been argued and you are now awaiting a decision by the United States District Court on the question of the right of the Maryland Casualty Company to become subrogated to the rights of the other sureties to the pledged collateral and the right to become subrogated to the payment of dividends on the deposits in the names of the trustees for the full amount of the deposits of bankruptcy funds as of the date of closing of the bank.

Your attorneys in their brief have covered quite fully the question of the right of the bank to pledge its assets to secure bankruptcy deposits and have relied principally upon the recent decision of the Supreme Court of the United States in the case of *Texas & Pacific R. R. Co.* v. *Pottorff*, 291 U. S. 245. In the recent case of *Evans* v. *New Haven Bank*, N. B. W. 72 F. (2) 664, it was held that bankruptcy deposits could be secured by a pledge of assets. See also *Fulton* v. *Lloyds Casualty Company*, 75 F. (2) 295, in which case it was held that state banks in Ohio did not have the power under the state statutes to pledge assets to secure bankruptcy deposits. In this same decision your Circuit Court of Appeals held that two surety companies which took a pledge of assets of a depository bank to secure them against losses on depository bonds executed by them covering public money of a City deposited in the bank, were not required to share the pledged assets with a third surety company which also executed a bond at about the same time to protect the same deposit.

It would appear that the decision of the United States Circuit Court of Appeals of your circuit in this last mentioned case might govern the decision of the Federal Court in the instant litigation as it is our understanding that the assets pledged on the $60,000. bond were not under any agreement pledged to secure the Maryland Casualty Company on its bond in the amount of $17,500.00. The right of a surety to subrogation in a case somewhat similar to the one now before your Federal Court is discussed in the recent case of *Ward* v. *First National Bank of Caruthersville, Mo.*,

and R. E. Bailey as Receiver, 76 Fed. Rep., 2nd Series, Advance Sheets, pg. 256.

The decisions above cited in this letter should be called to the attention of your attorneys, in view of the fact that the same would appear to apply in the case now pending before your United States District Court. Please advise this office when you expect a decision in the case pending before Judge Taylor.

Very truly yours,

H. J. HALL,
Assistant Supervising Receiver
Division of Insolvent Nat'l Banks.

LRS:DM

November 6, 1937.

Mr. John I. Cox, Receiver
The First National Bank
Elizabethton, Tennessee.

Dear Sir: Refer to CC-LD.

Reference is made to your letter of November 2, 1937 with which you forwarded a copy of the opinion entered by the United States District Court on October 27th in the case of United States of America, for the use and benefit of E. M. Miller, Trustee, et al v. First National Bank of Elizabethton, et al, in which the question involved is the right of the Maryland Casualty Company, as subrogee of the claim of the Trustees in Bankruptcy, to obtain pledged assets and their proceeds which were pledged for the purpose of securing the sureties on a $60,000.00 depositary bond and also involved the claim of the Maryland Casualty Company that it was entitled to dividends on the total deposit liability in the name of the Trustees in Bankruptcy in the amount of $50,065.83 until paid in full the amount of the Casualty Company's losses incurred by reason of the payment of the sum of $17,500.00 which it had paid to the bankruptcy trustee in full discharge of its liability as surety on a bond.

Under the decision of the court, the Maryland Casualty Company will be entitled to a general claim against your trust in the amount of $17,500.00 and will be entitled to dividends on the amount of that claim the same as any other general creditor of the bank. The court denied the Maryland Casualty Company's contention that it was entitled to dividends on the whole amount of the bankruptcy

deposits as of the date of closing of the bank and also denied the Casualty Company's claim to the remaining pledged assets or their proceeds.

Please forward a copy of the decree entered by the Federal Court in this matter as soon as it is handed down and you will, of course, advise the Maryland Casualty Company that upon receipt of a proof of claim in the amount of $17,500.00, dividends will be paid on this claim in the same proportion as have been paid to other general creditors of your trust. In the event the Maryland Casualty Company elects to appeal to the United States Circuit Court of Appeals from the decision handed down by the District Court in this matter, please advise us immediately, in order that we may give you such instructions as are necessary with respect to the position you will take in this matter.

Very truly yours,

J. H. BREWER, JR.,
Assistant Counsel.
Comptroller of the Currency.

LRS:DM

MOTION OF FIRST NATIONAL BANK—Filed September 19, 1933, by the Clerk.

In this cause come the defendants, First National Bank of Elizabethton, and John I. Cox, Receiver, and move the Court to set aside certain portions of the interlocutory decree entered in this cause on the 22nd day of December, 1932, being as follows:

(a) That portion of the decree contained in Section (3) pages 2 and 3, as follows:

"and The Maryland Casualty Company as surety on the bond of the First National Bank of Elizabethton to the United States of America for the use and benefit of the estates in bankruptcy having funds on deposit in the said First National Bank be and it is subrogated to the rights of the obligee in said bond so far as any collateral deposited by the said First National Bank of Elizabethton for the security of said bankruptcy deposits, after the said bank-

ruptcy deposits shall have been paid in full and after the satisfaction of the costs taxed and to be taxed in this cause."

(b) That portion of the decree contained in Section (7), pages 3 and 4, as follows:

"That after the payment of the costs of this cause taxed and to be taxed, and the payment in full of the bankruptcy deposits for the use and benefit of which this action was brought and decree rendered, the Maryland Casualty Company be and it is hereby subrogated to the rights of the obligee to the remaining funds, collateral, warrants and/or notes then in the hands of the Receiver hypothecated by the First National Bank of Elizabethton as security for said bankruptcy deposits as well as to any remaining dividends paid or to be paid by the Receiver of the First National Bank of Elizabethton on the claims filed with him by the Trustee in bankruptcy of the estates for whose use and benefit this suit is brought."

Defendants' motion being based upon the following grounds:

(1) Said interlocutory decree was not entered during a regular term of the Court, nor while the Court was in session hearing causes in the jurisdiction in which this suit was filed, and neither defendant or its attorney had any notice that said decree would be presented or application made to the Court to have it entered, and have had no such knowledge of the entry of said decree until within the past few days.

(2) Such portions of the decree undertaking to adjudicate the rights of subrogation are not based upon any pleadings or issues in the cause, and are, therefore, coram non judice.

(3) The defendant, Maryland Casualty Company is not entitled to be subrogated to the rights of the obligees in said bond or to any of the collateral deposited by the de-

fendant, First National Bank, for the protection of the sureties on said bond. Neither is said Company entitled to subrogation to the rights of the obligees in said bonds to any dividends paid or to be paid by the Receiver of the said First National Bank.

At the time such subrogation was undertaken, the said Maryland Casualty Company had not and did not pay the full amount of the indebtedness claimed by said obligees, and therefore, did not place itself in position to ask for subrogation.

(4) The said Maryland Casualty Company if entitled to subrogation at all, is only entitled to be subrogated to the claims of the obligees protected by its bond as against defendant, First National Bank, and/or John I. Cox, Receiver, and therefore, would be entitled to prove its claim as a creditor of said bankrupt on the basis of the amount paid by it, and to receive such dividends as may be declared and paid by the Receiver out of the trust estate.

Wherefore, defendants move that said interlocutory decree be corrected by striking therefrom the portion hereinbefore set out, and/or that said decree be corrected in such portions in the final decree now being entered in this cause.

First National Bank of Elizabethton,
(Signed) By John I. Cox,
Receiver.

(Signed)
Joseph Caldwell,
Susong, Susong & Parvin,
Attorneys for Defendants.

Filed Oct. 27, 1937.

IN THE UNITED STATES DISTRICT COURT
AT GREENEVILLE, TENNESSEE.

UNITED STATES OF AMERICA, for the use and benefit of
E. M. MILLER, TRUSTEE, ET AL.

v.

FIRST NATIONAL BANK OF ELIZABETHTON, ET AL.

Memorandum.

The remaining question for determination in this cause is the Casualty Co.'s claim for subrogation to the rights of the bankruptcy creditors and/or contribution from sureties on another bond guaranteeing the payment of the same deposits.

In order to clearly understand the rights of the parties now, their rights as of the date of suspension must be clearly understood.

When the Bank suspended it owed its creditors more than a million dollars. Among these creditors were various trustees in bankruptcy representing the creditors of estates in bankruptcy whose claims against the bank aggregated more than fifty thousand dollars.

In addition to the primary liability of the Bank on all of these indebtedness, there were in force certain bonds which furnished additional protection against loss to the creditors of bankrupt estates whose funds were on deposit to the credit of various trustees.

The Maryland Casualty Co. was surety on such a bond with a penalty or maximum liability of $17,500. The Bank was the principal obligor. This, of course, added nothing to the security of the depositors, as the Bank was already

liable as such on the deposits. When the Casualty Co. became secondarily liable on the bond, the Bank became liable to it for any losses it might incur by reason of the suretyship. This liability existed, whether express or not.

There was also in force and effect at suspension another bond executed April 14, 1931, with a maximum liability of $60,000 to secure the same depositors, signed by the Bank as principal obligor, and by a number of individuals as sureties, and on the same day and for the same purpose and also for the purpose of indemnifying the personal sureties, the Bank, pursuant to a resolution of its board of directors, assigned certain of its described assets, and provided for a substitution by the assignee trustee of same when necessary, and as agreed upon and provided for sale of same when default made same necessary.

On the same day C. L. Grindstaff executed a deed in trust of certain valuable real estate to further indemnify the same depositors, and authorized a sale of the property for that purpose if the Bank defaulted, and if he as surety to the Bank's obligation did not otherwise make good his suretyship. This was the situation when the Bank suspended on October 17, 1931 with these secured deposits in Bank in the sum of $50,065.83.

The Bank was insolvent when it suspended, and will not be able to pay its creditors, including its depositors, more than thirty per cent of their claims. In this situation the Bank closed its doors, and went into the hands of a receiver appointed by the Comptroller of the Currency.

On December 21, 1932, the Maryland Casualty Co. paid into the registry of the court the full penalty of its bond, $17,500 in full discharge of its liability under its contract.

On June 24, 1932, a receiver was appointed to take charge of all of the personalty assigned by the Bank on April 14, 1931, and to reduce same to his possession, and to collect same for the purposes for which assigned, which he has done and which collections have, together with the $17,500 paid by the Maryland Casualty Co. been applied to and fully discharged the secured deposit liability for which

the bonds were given, and other sums by the receiver collected have been applied to the costs and expenses incident to the receivership, and he has a balance on hand of $4,522.05 in cash, and certain valuable uncollected evidences of debt which were assigned by the Bank and which constitute a part of the receivership assets.

The secured depositors have been fully paid in the manner above detailed. The real estate conveyed in trust by Grindstaff was not sold and no surety on the second bond, which was executed by the Bank in the penalty of $60,000, has made any contribution, either by way of payment to depositors or to any other surety. The only payment by any surety was that of the Maryland Casualty Co., and it has had no payment to it by any principal or surety in any form, and seeks to recoup by invoking the doctrine of subrogation and/or contribution until its losses are fully paid.

The law is, of course, that in so far as the rights of other creditors are involved, the Maryland Casualty Co., when insolvency occurred, became the equitable owner of the assets of the Bank in the same percentage that its claim, through its fixed liability, was of the total claims against the Bank. As against the other creditors of the Bank that percentage must continue constant, otherwise it could happen that subsequent acts of a creditor or of a creditor and the insolvent would take from other creditors an interest which became vested with the event of insolvency. No increase in percentage of ownership, whether legal or equitable, could be accomplished without a corresponding decrease on the part of some or all other creditors.

An application of the principle, as announced in Merrill v. National Bank of Jacksonville, 173 U. S. 131, and of course applied in subsequent cases where the question has been presented and understood, results in a prohibition of the happening of any transaction or fact the effect of which would be to diminish the percentage equitable interest of any creditor in the assets of the insolvent. The validity of the Bank's pledging of its assets is immaterial. No timely objection was made to the pledgees, and the

property pledged, without timely objection, was reduced to cash and contributed to the creditors secured by the personal surety bond. The Casualty Co. contends for the validity, and Fulton v. Lloyd's Casualty Co., 75 Fed. (2d) 295, 297, leaves room for decision that sec. 101, tit. 11, U. S. C., gives national banks the right. But see T. P. R. Co. v. Pottorff, 291 U. S. 251, and 107 U. S. 450 and 56 Fed. (2nd) 799.

When insolvency was declared the bankruptcy fund creditors were in position to secure full payment. The Casualty Co. bond guaranteed it to the extent of $17,500. The Bank's personally secured bond guaranteed it to the extent of $60,000, and those who signed the $60,000 bond required the pledging of the assets to protect themselves as well as the creditors. The bond so recites. The Casualty Co. had no interest in these pledged assets and could acquire none to the prejudice of existing creditors. Fulton v. Lloyd's Casualty Co., 75 Fed. (2d), 295 (6th C. C. A.). To permit the Casualty Co. to diminish its actual contribution by acquiring, in effect, an interest in these pledged assets would diminish the dividends of the other creditors whose equitable interest to larger dividends was fixed by insolvency. This result cannot be accomplished by a change of factual basis which occurs subsequent to insolvency. The principal claim of the Casualty Co. is that it paid in part the debt of a secured creditor or creditors, and that, by subrogation, is entitled to assert the claim of all of them so paid (only in part) by it, and by claiming on the basis of the whole debt derive dividends greater than on its own claim against the Bank arising out of express or implied indemnity which arose out of its contract of suretyship. This right to claim on the whole of a debt partly secured arises out of the equitable interest which vests in creditors at insolvency of their provable share in the insolvent's assets. The security they may have held, set apart from the assets of the Bank while solvent were no part of the assets in which general unsecured creditors became vested with an equitable interest.

The secured creditors only owned these assets so set apart to the extent that they, (the pledged assets) were required to make good their deposits. The remainder, after the secured creditor was paid, was always property of the Bank, and in this residue only the equitable title vested in the creditors. Those assets, so far as pledged, have been appropriated. What remains of them belong now and always since insolvency belonged to the creditors. In them the Casualty Co. will share. The Casualty Co. is not entitled to contribution from the other sureties for it is not shown that the Casualty Co. has been required to pay or has paid any amount that these sureties would have been called upon to pay. The Casualty Co. bond was in force at the time the other sureties assumed liability, and their assumption was to secure other or additional deposits which had been made subsequent to the Casualty Co.'s bond or which might thereafter be made, and which were then secured by the Casualty Co.'s bond. It does not appear that the pledged assets which these sureties required as a condition to the assumption of the liability, plus dividends on the whole amount of the claims thus paid by them, would not have saved them harmless from any loss. This right to dividends could not be questioned, as at the time of insolvency these sureties became vested in equity to their pro rata of the unpledged assets of the Bank on the basis of their then fixed liability as sureties whether they claimed as subrogees or in their own right would be wholly immaterial.

That the Casualty Co., a paid surety, has no right to or interest in the benefits derived by the second set of sureties out of the pledged assets is settled by the case of Fulton v. Lloyd's Casualty Co., 75 Fed. (2d) 295, 297 (6th C. C. A.).

A number of questions of pleading have been raised by the parties, but there is no question presented which prevents a consideration of the meritorious questions presented involving subrogation and/or contribution, which must be denied.

The Casualty Co. will be entitled to dividends on its payment of the obligation of its bond, but not otherwise.

The order entered in this cause on December 22, 1932 purporting to grant to the Maryland Casualty Co. the right of subrogation and contribution without prejudice to the rights of the other sureties to contest said alleged right of contribution appears to have been entered inadvertently and not upon notice to the general creditors or their representative, or after hearing upon any pleadings properly presenting the question, was objected to by the receiver and action thereon reserved until its consideration became material and necessary.

What purports to be a consideration on the part of the Casualty Co., that is, the dismissal of its appeal and discharge of its admitted liability, was, of course, no consideration establishing any equity in favor of the Casualty Co., and what has been said hereinbefore is sufficient basis for a modification of said order in so far as it may be construed to give the Casualty Co. any rights prejudicial to other creditors by reason of its having discharged its named legal obligation under its bond.

The case of *United States Fidelity & Guaranty Co.* v. *McClintock*, 26 Fed. (2nd.) 944, 948, quoting and applying the principle announced by Mr. Justice Brandeis in *United States* v. *National Surety Co.*, 254 U. S. 73, 76, is not applicable to the facts here. There subrogation was allowed, and its allowance did not violate the rule or principle referred to herein and stated in *Merrill* v. *National Bank*, *supra*. The debt in *United States* v. *National Surety Co.*, *supra*, as here, had been paid in full, but there it was fully paid by funds contributed outside the assets of the bank, so that subrogation there did not change the recovery any creditor would have against the bank. There the percentage of vested equitable interest remained the same. Here if the right of subrogation should be allo ed, it would give to the Casualty Co. an interest in the Bank's assets which it not only did not have when insolvency occurred, but

which in the giving would take from other creditors of the insolvent rights which they had and to secure which they had already become vested with an equitable interest in the Bank's free assets.

(Signed) GEO. C. TAYLOR,
Judge.

V.

Office letters of January 15, 1936 and August 1, 1936 addressed to the Receiver of the First National Bank of Nephi, Utah, related to the claim of the American Surety Company as assignee of the claim of the State Land Board of Utah. The office position was that the surety company's claim for dividend purposes should be on the amount the surety actually paid rather than on the total amount of the deposit liability of the State Land Board of Utah. Suit was filed by the American Surety Company against the Receiver and the District Court of the United States for the District of Utah held for the surety in that instance. (opinion not reported). No appeal was taken from the decision in question by the receiver because further litigation would have resulted in a delay in termination of the receivership and the consequent payment of a final dividend to depositors and creditors.

January 15, 1936

Mr. W. C. Andrews, Receiver
The First National Bank of
Nephi, Utah

In reply
please refer to CC.

Dear Sir:

This will acknowledge receipt of your letter of January 6, 1936 concerning the secured deposit with your trust in the name of the Utah State Land Board. In reply to the office letter of December 21st you have submitted copies of the

two escrow agreements entered into between the First National Bank, The Utah State Land Board and the Walker Bank & Trust Company, as Trustee, under dates of November 22, 1932 and December 16, 1932, by means of which the bank pledged United States Treasury Bonds with a total par value of $6,000. as security for public money deposited by the Utah State Land Board. The deposit was also secured by a surety bond in the amount of $7,500.00 given by the American Surety Company. You advise that the liability due the State Land Board totalling $14,253.96 has been paid by a 5% ratable distribution made by the bank in July 17, 1933, the sale of the United States Treasury Bonds totalling $6,180.00 on September 1, 1934 and the payment of the balance due by the American Surety Company on July 1, 1935.

It is our understanding from your letter that the Receiver's Certificate of Proof of Claim filed by the Utah State Land Board has been assigned by the Board to the American Surety Company. You should advise us definitely whether the assignment covers the full amount of the deposit liability of the First National Bank of Utah in the sum of $14,253.96 or whether the assignment covers only the sum of $7,361.46. From the information submitted by you, we are inclined to believe that the American Surety Company would not be entitled to dividends upon the whole amount of the deposit in the sum of $14,253.96 but, on the other hand, would be entitled to dividends only upon the balance due after applying the collateral security pledged by the bank to the State Land Board. Refer Ward v. First National Bank of Caruthersville, et al, 76 F. (2) 256.

Therefore, if you find that the State Land Board has assigned its Proof of Claim to the American Surety Company for the whole amount of the deposit liability in the sum of $14,253.96 and the American Surety Company is claiming dividends as subrogee upon the whole amount of the deposit instead of upon the sum actually paid by the American Surety Company in discharging its obligation under the $7,500.00 surety bond, you are requested to have your attorney investigate this matter and advise you in order that you may inform this office as to the question of whether or not, in view of the above-mentioned decision, the American Surety Company is entitled to dividends upon the

whole amount of the deposit by reason of its having become subrogated to the rights of the Utah State Land Board.

This matter should be given your immediate attention.

Very truly yours,

(Signed) H. J. HALL,
Assistant Supervising Receiver
Division of Insolvent Nat'l Banks.

LRS:DM

August 1, 1936

Mr. W. C. Andrews, Receiver
The First National Bank
Nephi, Utah

Refer to CC-LD

Dear Sir:

Reference is made to your letter of January 20, 1936 concerning the secured deposit of the State Land Board in the amount of $14,253.96. In reply to the office letter of January 15th you advised that the deposit has been partially paid by means of a 5% dividend payment and the sale of all assets pledged to secure the deposit, from which sale the sum of $6,180.00 was derived and applied in payment of the claim. It appears that from information you have obtained, the American Surety Company has paid the State Land Board the remaining amount due on this claim because of the liability on the bond executed by the American Surety Company in the amount of $7,500.00 as security for this deposit. However, no information has been submitted to you advising that the claim of the State Land Board has been assigned to the American Surety Company.

We have heretofore called to your attention the case of Ward v. First National Bank of Caruthersville, 76 F. (2) 256, from which decision it would appear that the American Surety Company, as subrogee of the State Land Board, is entitled only to further dividends on the claim of the State Land Board based on the sum of $7,361.46.

Accordingly, at such time as you are advised that the American Surety Company, as assignee or subrogee of the

Utah State Land Board, is claiming further dividends on the Land Board's claim, you will inform the American Surety Company that further dividends will be paid on the sum of $7,361.46 only.

Very truly yours,

(Signed) KIT WILLIAMS,

Executive Assistant Counsel
Comptroller of the Currency.

LRS:DM

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH, CENTRAL DIVISION.

No. 13410.

AMERICAN SURETY COMPANY OF NEW YORK,
Plaintiff,

v.

THE FIRST NATIONAL BANK OF NEPHI, UTAH, ETC.,
Defendants.

I am of opinion that the rules laid down by the Supreme Court of the United States in *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131, are applicable to the facts in the instant case, and feel that I am bound by that decision notwithstanding the decision of the Supreme Court in the case of *Erie Railway* v. *Tompkins*, 304 U. S. 64, which overrules the old case of *Swift* v. *Tyson*, 16 Peters 1.

Let findings of fact, conclusions of law and judgment be prepared by counsel in accordance with the view above expressed.

Filed in United States District Court, District of Utah, December 9, 1938. W. B. Wilson, Clerk. By V. P. Ahlstrom, Deputy.

VI.

The Receiver of the Reading National Bank & Trust Company of Reading, Pennsylvania, was instructed by office letter of February 21, 1941 to allow a general or common claim for dividend purposes to the United States Fidelity & Guaranty Company in the amount actually paid by that company to the Clerk of the United States District Court upon a depository bond given as security for various bankruptcy deposits. The surety paid in part only the total liability due the secured depositor as of the date of the bank's closing.

Feb. 21, 1941.

Mr. H. F. Dunn, Receiver
The Reading Nat'l Bank & Trust Co.
502 Penn Street
Reading, Pennsylvania

Refer to CC-LD

Dear Sir:

Reference is made to your letter of February 14, 1941 concerning dividends due the United States Fidelity & Guaranty Company because of their payment of the sum of $4,996.30 to the Clerk of the United States District Court as the company's liability as surety upon a depositary bond given as security for various bankruptcy deposits with your bank totalling $68,145.59 as of the date of suspension. The bankruptcy accounts were paid through application of collateral security pledged by the bank, the proceeds of which amounted to $46,112.97, and the payment of a first dividend of 25% in the amount of $17,036.32, leaving a balance of $4,996.30 which was paid to the Clerk of the District Court by the surety in discharge of its liability

on the depositary bond. The surety company has heretofore insisted that it was entitled to payment of the sum of $4,996.30 in full at the time a 10% dividend was declared on the theory that the basis of the payment should be on the surety's asserted subrogation rights to further dividends upon the deposit liability of $68,145.59.

When the second dividend of 10% was authorized, we advised you to withhold payment of any dividends to the surety company because of the pending case of *American Surety Company of New York* v. *Bethlehem National Bank*, recently decided by the United States Circuit Court of Appeals, Third Circuit, and now reported in 116 F. (2d) 75. A copy of the opinion of the Circuit Court of Appeals was forwarded to you with our letter of December 6, 1940 and you were requested to reexamine the claim of the United States Fidelity & Guaranty Company to determine the dividends payable to the company on a claim for the amount actually paid by the surety on the depositary bond.

The surety company is now willing to accept a common claim for the amount they actually advanced in the sum of $4,996.30. You therefore request authority to establish an additional liability in the sum of $4,996.30 and to pay dividends due on a claim in that amount.

You may advise the United States Fidelity & Guaranty Company that a general or common claim will be allowed in the amount of $4,996.30 and dividends due on such a claim will be promptly paid. A separate letter will be forwarded concerning necessary accounting instructions with respect to this matter.

Very truly yours,

(Signed) E. H. Gough,
Deputy Comptroller.

LRS:DMY
2/19/41

VII.

Correspondence Concerning Instant Case.

The letter of January 17, 1936, indicates that the receiver is, for the first time, requesting instructions from the Comptroller as to the amount of claim to be allowed the surety and consequently that the letter of the receiver to the surety, dated December 23, 1935, (R. 8) proposing to allow the

surety a claim of $122,588.56, was written without previous instructions from the Comptroller. The letter of July 9, 1936, specifically instructed the receiver to allow a claim of $68,588.56, constituting the amount paid by the surety. That letter refers to the Comptroller's letter of April 10, 1936, (which was in response to the receiver's letter of January 17, 1936) and indicates that the receiver had previously been advised that the surety's claim must be restricted to $68,588.56. Following the aforesaid letter of July 9, 1936, the receiver wrote the surety on July 11, 1936, (R. 9) advising the surety of the limitation of its claim to $68,588.56.

Paragraph 14 of the Bill of Complaint (R. 6) refers to an offer by the receiver to the surety, under date of August 30, 1939, to allow the surety a claim of $122,588.56. A search of our files discloses no letter either authorizing or relating to said offer of August 30, 1939. Counsel for petitioner has today (November 13, 1941), by telephone, authorized the insertion of the following statement by the undersigned as counsel for respondent:

> "With reference to the admitted allegation in paragraph 14 (R. 6) concerning the offer of the receiver of August 30, 1939, I am advised by counsel for petitioner that this offer was orally made by the receiver during the course of a conference on that date attended by the receiver, counsel for the petitioner, and local counsel for the receiver."

It will be noted that the offer of August 30, 1939, was made by the receiver and not by the Comptroller, and that the correspondence indicates that said offer was not authorized under the previous instructions given by the Comptroller.

January 17, 1936.

Comptroller of the Currency,
Treasury Department,
Washington, D. C.

Re: Advice Relative to Deposit Account.

Dear Sir:

I desire to advise you that the Commonwealth of Pennsylvania had on deposit with The Bethlehem National Bank, as of the closing date on March 4, 1933, deposits amounting to $135,000.00, as detailed in the following schedule:

Detail	Amount
Federal Unemployment Relief Fund	$65,000.00
Motor License Fund	70,000.00
Total	$135,000.00

A first dividend of 40% amounting to $54,000.00 was distributed to the Commonwealth of Pennsylvania on or about February 17, 1934, and it appears that collateral comprising 12M United States Treasury Bonds, 3⅛%, 1946-1949, were pledged with the Commonwealth of Pennsylvania, as collateral security for these deposits. I am enclosing herewith a copy of an instrument executed by the officers of The Bethlehem National Bank on January 17, 1933, relative to the pledging of these securities to the depositor. On April 23, 1934, the above-mentioned collateral was sold for a consideration of $12,411.44, and the proceeds were applied to the partial liquidation of the deposit liability of the Commonwealth of Pennsylvania.

In accordance with an instrument executed May 10, 1934, the Commonwealth of Pennsylvania assigned the unpaid balance of the account to the American Surety Company. In computing the second dividend amounting to 20% to be distributed to the American Surety Company as assignee,

the following method was pursued in the determination of a second dividend in the amount of $19,553.13 actually due the assignee:

Original deposit of the Commonwealth of Pennsylvania, as of March 4, 1933, and subsequently assigned to the American Surety Co., on May 10, 1934	$135,000.00
Deduct: Proceeds from sale of 12M United States Treasury Bonds, 3⅛%, 1946-1949 pledged to the Commonwealth of Pennsylvania as collateral for these deposits, and sold April 23, 1934	12,411.44
Net Deposit	$122,588.56
First Dividend of 40% actually paid (40% of $135,000.00)	$ 54,000.00
Correct amount of First Dividend amounting to 40% (40% of $122,588.56)	49,035.42
Net Excess Payment	$ 4,964.58
Second Dividend of 20% (20% of $122,588.56)	$ 24,517.71
Deduct: Excess payment in connection with distribution of First Dividend	4,964.58
Net Amount of Second Dividend	$ 19,553.13

A second dividend amounting to 20% was approved by your office on December 10, 1935, and I am enclosing herewith a copy of a letter received from this company dated December 28, 1935, reflecting the objections to the computation of the dividend as disclosed in my communication. Will you kindly advise me whether my computation with respect to the payment of the second dividend is correct.

Respectfully,

HARRY MARGOLIS,
Receiver.

HM:CF
Enc. (2)

July 9, 1936.

Mr. Harry Margolis, Receiver
The Bethlehem National Bank
Third and Adams Streets
Bethlehem, Pennsylvania

Reply to CC-LD

Dear Sir:

Reference is made to your letters of April 20th, May 20th and June 12th concerning the secured deposit with your trust in the name of the Commonwealth of Pennsylvania in the amount of $135,000.00. You have forwarded a copy of the instrument dated May 10, 1934 wherein the Treasurer of the Commonwealth of Pennsylvania agreed to subrogate the American Surety Company of New York to all the rights and remedies of the Commonwealth of Pennsylvania to the extent of $70,738.90 against the Bethlehem National Bank and assigning to the American Surety Company the claim filed by the Treasurer of the Commonwealth of Pennsylvania against the bank.

It is our understanding that the total amount of the deposit plus interest earned under the contract of deposit up to the date of closing was in the amount of $135,000.00. The $12,000.00 par value United States Treasury bonds pledged by the bank with the Commonwealth of Pennsylvania as additional security for the state deposit were sold and the proceeds thereof applied in reduction of the liability due the Commonwealth. A first dividend check of 40% was also paid the Commonwealth on its claim, leaving a balance of $68,588.56, which last amount was paid by the American Surety Company to the Commonwealth of Pennsylvania, because of the Surety Company's liability as surety on a depositary bond in the amount of $125,000.00, dated December 10, 1928.

The American Surety Company is now claiming that it is entitled to dividends now due and payable on the whole amount of the deposit in the name of the Commonwealth of Pennsylvania on the grounds that the American Surety Company became subrogated to all the rights of the Commonwealth on its claim against the bank when the American Surety Company paid the remaining amount due the Commonwealth in the sum of $68,588.56.

In our letter of April 10th we advised you that due to the decision of the United States Circuit Court of Appeals in

the case of Ward v. First National Bank of Caruthersville, 76 F. (2) 256, it was our opinion that under that decision the American Surety Company is entitled to future dividends on the sum of $68,588.56 only and is not entitled to dividends as they are due and payable on the whole amount of the Commonwealth of Pennsylvania deposit as of the date of closing. In other words the American Surety Company paid out of its own funds the sum of $68,588.56 as the principal amount still due the Commonwealth of Pennsylvania after the bank paid a 40% dividend and after the bank's assets pledged to the Commonwealth were applied in partial reduction of the indebtedness. It is our position therefore that the American Surety Company is entitled to the second dividend now due and payable in the amount of 20% on the sum of $68,588.56 only and to such further dividends as may be paid in the future on this amount.

We note that the American Surety Company is also claiming that they are entitled to the payment of dividends on interest alleged to have accrued on the secured deposit after the date of closing of the bank. This claim must be denied.

The only claims entitled to allowance in the liquidation of a national bank are those in existence on the date of insolvency. Refer White v. Knox, 111 U. S. 784; Merrill v. National Bank, 173 U. S. 131. Your Circuit Court of Appeals has held in the case of Richman v. First M. E. Church of Collingswood, N. J., 76 F. (2) 344, that a secured creditor of an insolvent national bank is not entitled to interest on his secured deposit after the date of closing of the bank. We are enclosing herewith a copy of the decision of the United States District Court, Western District of Oklahoma, in the case of Fash v. First National Bank of Alva, in which case it was held that a secured creditor was not entitled to interest on his deposit after the date of closing of the bank, even though the creditor held collateral security for the deposit. To this same effect see the decision of the Appellate Division of the Supreme Court of New York in the case of Louis Pink, Supt. of Insurance v. Harriman National Bank & Trust Company, copy enclosed. This rule has been followed in the liquidation of insolvent state banks. Refer to the decision of the Supreme Court of Oklahoma in the case of In Re American Bank and Trust Co. of Ardmore, 55 Pac. (2) 470.

After you advise the American Surety Company with respect to the dividends due that Company as subrogee of the Commonwealth of Pennsylvania on the claim hereinabove discussed, you should advise this office relative to the reply received by you, and in the event suit is filed, copies of any and all pleadings should be submitted immediately to this office in order that we may be fully informed relative to all developments. You are instructed to submit to us for examination before filing, any brief which your attorney prepares in the event suit is commenced against you.

In the event the American Surety Company files a suit in the state court, you will have your attorney immediately remove the same to the Federal court as a suit involving the winding up of the affairs of an insolvent national bank. Refer Studebaker Corporation v. First National Bank, 10 Fed. (2) 590; Larabee Flour Mills v. First National Bank, 13 F. (2) 330. When such a petition and bond for removal is filed in the state court, the case is in fact removed, all jurisdictional questions being for determination by the Federal court on petition to remand. Williams v. N. Y. P. & N. Ry. Co., 11 F. (2) 363 and Herbert v. Roxana Petro. Corp., 12 Fed. (2) 81.

Very truly yours,

KIT WILLIAMS,
Executive Assistant Counsel Comptroller of the Currency.

Approved,
(Signed) GIBBS LYONS,
Deputy Comptroller.

Enclosure
LRS:DM

Oct. 27, 1939.

Mr. Benjamin Nieman, Receiver
The Bethlehem National Bank
115 East Third Street
Bethlehem, Pennsylvania

Dear Sir:

Reference is made to your letter of October 9, 1939 with which you forwarded a copy of a bill of complaint filed in the United States District Court, Eastern District of Penn-

sylvania, in the case of *American Surety Company of New York* v. *The Bethlehem National Bank and Benjamin Nieman, as Receiver.*

In this case the surety company is endeavoring to obtain as assignee or subrogee of the claim of the Commonwealth of Pennsylvania dividends on the original claim filed by the Commonwealth of Pennsylvania in the amount of $135,000.00. In our letters of June 15th and June 28th we asked that your counsel look into the question of the amount due on the claim of the American Surety Company and at that time we called your attention to the decision of the United States Circuit Court of Appeals, Sixth Circuit, in the case of *Maryland Casualty Co.* v. *Cox,* decided June 7, 1939 and now reported in 104 F. (2d) 354 (rehearing petitions denied). This decision as well as the case of *Ward* v. *First National Bank of Caruthersville,* (C. C. A. 8th, 1935) 76 F. (2d) 256, appear to sustain your position that the surety company in this case is not entitled to dividends upon the claim of the Commonwealth of Pennsylvania, but on the other hand is entitled to dividends only on the amount it actually paid as surety on the depositary bond.

While we believe most of the legal questions involved are discussed fully in the cases cited in our letters of July 9, 1936, June 15, 1939 and June 28, 1939, please call to the attention of your counsel the following cases to the effect that attorney fees prayed for by a claimant in a case such as this cannot be allowed against an insolvent national bank. *Fash* v. *First National Bank of Alva,* (C. C. A. 10th, 1937) 89 F. (2d) 110, 112; *Pink* v. *Harriman National Bank & Trust Co.,* (1936) 287 N. Y. S. 461, 463; *Citizens Bank* v. *Thornton,* (C. C. A. 5th, 1909), 174 Fed. 752, 763.

We note your statement that your counsel has moved for summary judgment on the pleadings. As you forwarded a copy of the bill of complaint only, please transmit copies of all other pleadings filed and copies of all briefs which are submitted to the court in this case, addressing your reply to the Comptroller of the Currency for the attention of Mr. Stover.

Very truly yours,

GEORGE P. BARSE,
General Counsel,
Bureau of Comptroller of the Currency.

LRS:DMY
10/26/39